UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

SARAH JONES, a/k/a/ JANE DOE,

Plaintiff,

v.

DIRTY WORLD ENTERTAINMENT RECORDINGS LLC, *et al*.,

Defendants.

Case No. 2:09-cv-00219-WOB

Judge William O. Bertelsman

REPLY IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND, ALTERNATIVELY, MOTION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

In the forty months since this case began, the Court has heard a lot about the Communications Decency Act. This brief will likely be Defendants' final word on the subject. For that reason, the discussion will be less formal and more pragmatic. The goal is to assist the Court in finding the best answer to an important question: *what should happen to this case*? We have three simple options.

Option #1 (which Defendants believe is the only legally proper choice) is to revisit the CDA, agree however reluctantly that it applies here, and enter summary judgment in favor of Defendants on that basis. Ms. Jones could then appeal if she chooses, or she could move forward with her life.

Option #2 would have the Court affirm its prior order denying CDA immunity, but then stay the case and certify the matter for an interlocutory appeal pursuant 28 U.S.C. § 1292(b). In that posture, Defendants will appeal to the Sixth Circuit and, if necessary, to the United States Supreme Court.

Option #3 (which Ms. Jones favors) is for the Court to deny summary judgment and refuse an immediate appeal. In that case, the matter will proceed to a second trial which may or may not result in a verdict. Because Ms. Jones has promised *not* to retry the case in the event of another hung jury, this could also mean that the critical legal issue—how to apply the CDA—would remain unresolved. It would also mean that four years of litigation and hundreds of thousands of dollars in fees were completely wasted.

In the end, it boils down to this—which is the correct choice and why? Insofar as the CDA is unquestionably an extremely important law, and insofar as online speech is not going away anytime soon, it is clear that appellate review of the CDA is absolutely essential for everyone involved. As the saying goes: *We either have a rule or we don't*. A rule that is unclear or filled with vague exceptions is worse than no rule at all.

For that reason, although the parties might seem far apart in other ways, the truth is that everyone seems to at least agree on one thing—the legal issues involved in this case are extremely important. The disposition of this action will directly affect the way that interactive websites operate. Moreover, if the Sixth Circuit agrees with this Court's narrow view of the law, it would create a split with every other circuit that has applied the CDA "broadly". In that event, it seems likely that the United States Supreme Court would grant *certiorari* to resolve the split.[1]

Without a final resolution of this purely legal question from a higher appellate-level court, this case can never be fully and finally resolved. As such, appellate review of the CDA is absolutely essential. Put simply, if the CDA does not apply to www.TheDirty.com, then the site cannot survive. On the other hand, if the CDA does apply, then this case should have been dismissed nearly four years ago.

Defendants understand that Ms. Jones would like a second trial to "clear her name". This goal misses the point. Defendants did not create the speech that Ms. Jones claims was false. For that reason it is difficult (and ultimately unnecessary) for Defendants to prove the posts are true. In other words, but for the Court's refusal to apply the CDA, Defendants would be happy to stipulate that the posts about Ms. Jones are false (or at least that they cannot be proven true). However, because the Court has denied CDA immunity, Defendants are left with no choice but to argue other issues, such as by challenging Ms. Jones's credibility in light of the Dixie Heights matter.

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[1] As this Court may know, shortly after the CDA was passed in 1996, the Supreme Court struck down an unrelated portion of the law (dealing with regulation of internet pornography) as unconstitutional in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997). The Court has never considered § 230(c) of the CDA—the part at issue in this case.

This posture is counterproductive to the goal of helping Ms. Jones clear her name. Instead, it forces the parties (and the Court) to needlessly spend large amounts of time and energy arguing about the *wrong* issues. For Defendants, the sole question here is whether the CDA applies. If it does, then *even if* the posts about Ms. Jones are false, Defendants must prevail. On the other hand, if the CDA does not apply, then www.TheDirty.com cannot and will not survive.

Therefore, as a practical matter, rather than forcing the parties to spend valuable time and resources litigating irrelevant issues at this level, the Court should allow this matter to move forward to the next stage. This can happen either by granting summary judgment in favor of Defendants (thus allowing Ms. Jones to appeal) or by denying summary judgment and certifying the matter for an interlocutory appeal under 28 U.S.C. § 1292(b) (in which case Defendants will appeal). Either way, appellate review will benefit both sides by allowing this case to move closer toward a final resolution of the only issue which actually matters. Forcing the parties to endure a second trial will do nothing to benefit either side—*even if Ms. Jones prevails*.[2]

Having said this, Defendants believe the Court has virtually all of the information it needs to decide this case correctly. Defendants also accept there is little value in beating a dead horse. Nevertheless, as this is the final opportunity to do so, it is important to make it crystal clear that Plaintiff's view of the law is hopelessly flawed because it is based on several fundamental myths, all of which are directly contrary to the law. Each is explained *infra*.

MYTH #1—Website Owners Who Act *Like Editors* Are Not Protected

One of Ms. Jones's most pervasive (and most erroneous) arguments goes something like this—the CDA only applies to website owners who do *not* act like editors. Put another

[2] Due to the amount of debt already owed by Dirty World, any judgment entered in favor of Ms. Jones would result in an immediate bankruptcy. Because DW has more than $600,000 in debt owed to secured creditors in addition to substantial other unsecured debts, it is virtually certain that in the event of a bankruptcy, unsecured creditors such as Ms. Jones would receive nothing.

way, according to Ms. Jones a website owner who *screens*, *reviews*, *moderates*, and/or *chooses* which content to publish is acting *like an editor* and thus is responsible for their editorial choices. In Ms. Jones's view, only websites like Facebook (which does not pre-screen or edit content before publishing it) can claim CDA immunity because Facebook itself generally does not act like an editor.

In all candor, for non-lawyers and those unfamiliar with the CDA, this argument sounds completely logical. Indeed, consider this—the primary authority cited by Ms. Jones to support this position was Mr. Richie's interview with Dr. Phil McGraw[3] who seemed to share Ms. Jones's layperson's view:

> Dr. Phil: OK, so you do edit the site?
>
> Nik Richie: Yes, everything's moderated.
>
> Dr. Phil: OK, so you do take ownership of this site because you're editing it, and therefore responsible for what clears and what doesn't.

The main flaw with this view is not that it is entirely wrong. Rather, the flaw is that that it is *partially correct*. Because this theory "sounds right", both Ms. Jones and Dr. Phil think it must be correct.

Therein lies the problem—*but for* the CDA, this view would be correct. If this case involved a "traditional" publication like a newspaper or a magazine, or if this case involved a website post prior to 1996, Dr. Phil's opinion that Mr. Richie should face liability as an "editor" or "publisher" would be 100% correct.

[3] The transcript of the Dr. Phil interview was filed on October 12, 2011 as Doc. #66-1 in support of Ms. Jones's response to Defendants first Motion for Summary Judgment. Defendants have objected and continue to object to the transcript on the basis that Dr. Phil's comments are both irrelevant and are pure hearsay. However, in this context Dr. Phil's remarks are not being offered for their truth, but merely to illustrate that he misunderstands the law in the same manner as Ms. Jones.

As Defendants have explained repeatedly, prior to 1996 the law permitted editors and publishers to be held liable even when the underlying content was created by a third party; "it is well settled that in the absence of a statute newspapers as such have no peculiar privilege, but are liable for what they publish in the same manner as the rest of the community … ." *Louisville Times Co. v. Lyttle*, 257 Ky. 132, 141, 77 S.W.2d 432 (KY. 1934) (emphasis added). *In the absence of a statute*, this traditional rule existed for perhaps 100 years or more until 1996 when Congress finally passed a statute that created a new and different set of rules for website editors and publishers.

When Congress enacted the CDA, it did so for the express purpose of *changing* and preempting pre-existing law. As such, since 1996 online editorial conduct by website owners is treated very differently than it is for other forms of media such as newspapers, magazines, and books. While editors of newspapers and magazines remain liable for their editorial choices, website owners and operators enjoy absolute immunity for anything that falls within the broad rubric of "editorial conduct" such as screening content, choosing which posts to allow and which to reject. On this point, courts are 100% unanimous—all editorial conduct by website owners is protected. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (explaining "Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties."); *Green v. America Online, Inc.*, 318 F.3d 465, 471 (3rd Cir. 2003) (holding "There is no real dispute that [plaintiff's] fundamental tort claim is that [the defendant website operator] was negligent in promulgating harmful content and in failing to address certain harmful content on its network. [Plaintiff] thus attempts to hold [Defendant] liable for decisions relating to the monitoring, screening, and deletion of content from its network - actions quintessentially related to a publisher's role. Section 230 'specifically proscribes liability' in such circumstances.") (emphasis added) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). This immunity applies even if the website owner acts in bad faith by allegedly charging money to remove posts. *See Levitt v. Yelp!, Inc.*, 2011 WL 5079526 (N.D.Cal. 2011) (expressly rejecting argument).

To be sure, some courts are uncomfortable with the fact that the CDA creates different and apparently inconsistent standards for online vs. off-line publishers; "There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech 'providers and users of interactive computer services' when the defamatory or obscene material is 'provided' by someone else." *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003). Nevertheless, whether or not a court agrees with the policy behind the CDA is irrelevant. Despite the vast powers conferred by Article III, federal courts have no authority to usurp the exclusive right of Congress under Article I to legislate matters of policy; "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art. I, § I. *See also Noah v. America Online, Inc.*, 261 F.Supp.2d 532, 539 n.5 (E.D.Va. 2003) (refusing to ignore CDA based on argument that the law was "bad policy"; "Plaintiff argues that providing ISPs immunity … is bad policy. Yet, it is not the role of the federal courts to second-guess a clearly stated Congressional policy decision.")

In sum, Ms. Jones's argument—that Mr. Richie must take responsibility for every post on his site because he acts like an "editor"—is nothing more than a legal myth. Not only is this conclusion entirely false, it is the opposite of the law. Rather than *discouraging and punishing* editorial practices, the CDA was intended to *encourage* website owners to take an active role in reviewing and moderating content without fear of liability.

MYTH #2—Websites That "Encourage Offensive Content" Are Not Protected

As the Court is aware, Ms. Jones has consistently argued based on *dicta* from the Tenth Circuit's decision in *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009), the CDA does not apply to any site that "encourages offensive content". Although this Court initially agreed with this argument, it is another myth.

On pages 9–11 of their original summary judgment reply brief (Doc. #70) Defendants discussed this issue in detail. Put simply, *FTC v. Accusearch* does NOT support the idea that a website will lose immunity if it "encourages offensive content". Such was not the holding of that case and it is not the law.

As the Court is aware, Defendants previously cited *Shiamili v. The Real Estate Group of New York, Inc*., 952 N.E.2d 1011, 17 N.Y.3d 281, 2011 WL 2313818 (N.Y. June 14, 2011) which explained that contrary to Ms. Jones's view, "Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects." Defendants acknowledge that this Court disagreed with *Shiamili's* logic, but it is unclear why this is so.

Indeed, *Shiamili* is far from the only case to hold that websites will *not* lose CDA immunity merely because they "encourage" offensive content. Another good example of this is *Donato v. Moldow*, 374 N.J.Super. 475, 865 A.2d 711 (N.J.Sup. 2005). *Donato* involved an action filed against a website operator seeking damages for defamation, harassment, and intentional infliction of emotional distress arising from several posts containing "vile and derogatory" messages posted on the defendant's website.

Although the offending messages were posted by third parties, the plaintiffs argued that the website owner should be held liable for virtually identical reasons to Ms. Jones:

> [Plaintiffs'] overriding allegation against [website operator] Moldow is that he is liable as a publisher of the defamatory statements made by others. They further allege that Moldow was more than passive in his role as publisher, and "has actively participated in selective editing, deletion and re-writing of anonymously posted messages on the Eye on Emerson website and, as such, is entirely responsible for the content of the messages." [Plaintiffs] elaborate with these factual allegations, by which they argue that Moldow shaped the discussion and thus participated in developing the defamatory statements … ."

Donato, 374 N.J.Super. at 483, 865 A.2d at 716. Among other specific reasons, the plaintiffs argued that the website owner Mr. Moldow "encouraged" unlawful content, and thus lost CDA immunity because he allowed users to post <u>anonymous</u> comments and as a

result: "The format of the discussion forum encourages the use of harassing, defamatory, obscene and annoying messages because users may state their innermost thoughts and vicious statements free from civil recourse by their victims." *Id*. at 484. The plaintiffs further argued that "Moldow controls the content of the discussion forum by various methods, including selectively deleting messages he deems offensive, banning users whose messages he finds 'disruptive' to the forum and posting messages to the users who violate his rules of usage. While Moldow is quick to remove any negative message about himself or people he associates with, he allows offensive messages against the plaintiffs and their support[er]s to remain." *Id*. Finally, the plaintiffs claimed that Mr. Moldow added his own comments to the discussion and that he "actively participates in the editing of messages."

These are arguments are each identical to those asserted by Ms. Jones. However, in a thoughtful and comprehensive opinion which discussed numerous other cases, the New Jersey court rejected all of these arguments as unsupported and irrelevant myths which had no impact on Mr. Moldow's claim of CDA immunity:

> [A]pplying these principles to the case before us, we are satisfied that Moldow, by virtue of his conduct, cannot be deemed an information content provider with respect to the anonymously-posted defamatory statements. His status as a provider or user of an interactive computer service garners for him the broad general immunity of § 230(c)(1). That he allows users to post messages anonymously or that he knows the identity of users of the website are simply not relevant to the terms of Congress' grant of immunity. The allegation that the anonymous format encourages defamatory and otherwise objectionable messages "because users may state their innermost thoughts and vicious statements free from civil recourse by their victims" does not pierce the immunity for two reasons: (1) the allegation is an unfounded conclusory statement, not a statement of fact; and (2) the allegation misstates the law … .

Id. at 498 (emphasis added).

Whether the Court applies *Moldow*, *Shiamili*, or any of the dozens of other similar cases, the fact remains that every website which contains "offensive" content may have arguably done *something* to encourage the creation of such content. After all, if offensive content was not encouraged by the site, then it would not appear on the site, right?

This is why the "encouragement" standard advocated by Ms. Jones is so utterly useless; it creates a vague exception to the CDA which is broader than the rule itself. For that reason, courts have consistently refused to adopt such a standard. *See Chicago Lawyers Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc*., 519 F.3d 666, 671 (7th Cir. 2008) (rejecting the argument that the website www.craigslist.org could be held responsible for "causing" unlawful discriminatory content to be posted on its site: "Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money 'cause' bank robbery, because if there were no banks there could be no bank robberies." (emphasis added).

Here, the only thing that Defendants did to "encourage" the posts about Ms. Jones was to provide a blank form that a third party used to submit the posts to the website. As the Missouri District Court explained in *S.C. v. Dirty World*, "In sum, a third party unilaterally created and submitted the Church Girl Post without specific instructions or requests from the Defendants to do so. This is precisely the type of situation that warrants CDA immunity." *S.C. v. Dirty World, LLC*, 2012 WL 3335284, *4 (W.D.Mo. 2012) (emphasis added).

MYTH #3—Because Mr. Richie Adds His Own Comments, He Is Not Immune

In various places in her Response, Ms. Jones argues that because Mr. Richie "adds a tagline" and makes his own comments about material submitted by third parties, this means he is an "information content provider" and thus he cannot be immune under the CDA since this immunity only attaches to the provider of an "interactive computer service". This argument is a *non-sequitur* because EVERY court that has ever considered the CDA has agreed—a person can be both an "information content provider" and be a provider of an "interactive computer service". There is simply nothing inconsistent about this dual role.

One of the earliest cases on this point was *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (Cal.App. 4th Dist. 2002). In *Gentry*, the plaintiff sued online auction website www.ebay.com because third parties used the site to sell counterfeit sports memorabilia in violation of California law. Although all of the allegedly unlawful content originated with third parties, the plaintiff argued that eBay was not entitled to CDA protection because the site itself created and displayed text that "misrepresented the safety of purchasing items from the individual defendants and knew or should have known the individual defendants were conducting unlawful practices but failed to ensure they comply with the law." *Gentry*, 99 Cal.App.4th at 833.

The *Gentry* court agreed that because eBay itself created some of the text appearing on its website, eBay qualified as an "information content provider" with respect to *that text*. Nevertheless, the court also explained this did not in any way affect eBay's role as the provider of an "interactive computer service" and thus eBay remained immune as long as it did not create the actual content claimed to be actionable:

> We note the fact appellants allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which appellants seek to hold it liable. It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading.

Id. at 833 n.11 (emphasis added). This same logic has been accepted by every court that has considered similar facts, including *Donato v. Moldow*. In *Donato*, the court noted that the website operator, Moldow, added his own comments about third party posts—exactly like Nik Richie—but the court found this irrelevant to the CDA analysis; "Nor does it matter that Moldow praised some comments favorable to him and ridiculed some comments favorable to appellants, and vice versa. The fact remains that the 'essential published content,' the defamatory statements, were provided by third parties. It cannot be said that, by the totality of his conduct, as alleged in the complaint, Moldow was

responsible, in part, for the creation or development of the defamatory messages. They were created by their authors. Development requires material substantive contribution to the information that is ultimately published." *Donato*, 374 N.J.Super. at 500, 865 A.2d at 726–27 (citing *Gentry*) (quoting *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1124 (9th Cir.2003)).

Again, this same result has been recognized by every court faced with similar facts. *See*, *e.g.*, *Phan v. Pham*, 182 Cal.App.4th 323, 105 Cal.Rptr.3d 791 (Cal.App. 3rd Dist. 2010) (author who added introductory comment to allegedly defamatory email entitled to CDA immunity); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (website operator entitled to CDA for publishing allegedly defamatory message despite making "minor alterations" to the message before posting); *DiMeo v. Max*, 433 F.Supp.2d 523 (E.D.Pa. 2006) (self-proclaimed blogger "whose professed goal in life is '[t]o be a celebrity that gets paid to get drunk, act like an asshole, and get drunk some more[]'" entitled to CDA immunity for posts submitted to his site by third parties even though blogger created his own content appearing on site).

The only contrary authority cited by Ms. Jones is *Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785 (N.D.Cal. 2011). However, even the most basic review of *Fraley* shows it has no application here.

Unlike this case, *Fraley* was not a defamation case. Rather, *Fraley* involved claims that "Facebook unlawfully misappropriated Plaintiffs' names, photographs, likenesses, and identities for use in paid advertisements without obtaining Plaintiffs' consent." *Fraley*, 830 F.Supp.2d at 790. In short, the claims at issue in *Fraley* accused Facebook of using the names/photos of Facebook users in paid advertisements which made it appear (falsely) that the users "liked" or "endorsed" the products/services being promoted. These allegedly unlawful ads were not created by third parties; they were created by Facebook itself without the knowledge or consent of the people whose names/images were used. For that reason, the court understandably (and quite correctly) held that the CDA did not apply because "Facebook's actions in creating Sponsored Stories go beyond 'a publisher's

traditional editorial functions[,] such as deciding whether to publish, withdraw, postpone or alter content." *Id*. at 802.

In order for *Fraley's* logic to apply here, Ms. Jones would have to accuse Mr. Richie of using her name/image in a commercial advertisement without her consent and in a manner that violated Kentucky law. But Ms. Jones has never asserted any such claim, nor could she do so. For that reason, because Ms. Jones's claims are based solely on Mr. Richie's "traditional editorial functions[,] such as deciding whether to publish, withdraw, postpone or alter content," they are barred by the CDA.

MYTH #4—Mr. Richie Actually *Encouraged* The Posts About Ms. Jones

As explained above, as a matter of law CDA immunity cannot be denied merely because a website "encourages" users to post *something*; "The fact that Roommate[s.com] encourages subscribers to provide *something* in response to the prompt is not enough to make it a 'develop[er]' of the information under the common-sense interpretation of the term … ." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (emphasis in original). Despite this, Ms. Jones argues not only that immunity can be denied based solely on general "encouragement", she further argues that as a matter of fact Mr. Richie should be denied immunity because he actually caused third parties to submit the harmful posts about Ms. Jones by adding his "tagline" and by "taunting" her with his suggestion that she "dug her own grave"; "Just by posting the submission Richie validates what has been sent in. He taunts victims in front of his audience, including the Plaintiff [cite] thereby encouraging his readers to post more about that victim, as well as to generate similar submissions about others, in the hopes that Richie will select theirs to expound upon." Doc. 186 at 6 (emphasis added)

As a matter of law, this argument fails because it is legally incorrect. As explained in *Roommates*, the mere fact that a website owner encourages users to post *something* does not mean the website owner has lost protection under the CDA. However—even if Ms. Jones's view of the law was correct, she overlooks an essential fact—100% of the content she claims is actionable was posted before Mr. Richie made any comments about her.

The undisputed facts are as follows. The first post about Ms. Jones appeared on the site on October 27, 2009 with photos of her fraternizing with Bengals kicker Shayne Graham. At the time this post was submitted, it is undisputed that Mr. Richie did not know Ms. Jones, had never heard of Ms. Jones, and no other posts featuring Ms. Jones had ever appeared on the site. As usual, Mr. Richie made a sarcastic and crude comment about this post, but his comment was about Shayne Graham, not about Ms. Jones.

Update Graham Does It Again

Posted in Cincinnati, Dirty Athletes, Dirty Cheerleaders, The Dirty | January 9th, 2010

THE DIRTY ARMY: Nik, this is Sara J, Cincinnati Bengal Cheerleader. She's been spotted around town lately with the infamous Shayne Graham. She has also slept with every other Bengal Football player. This girl is a teacher too!! You would think with Graham's paycheck he could attract something a little easier on the eyes Nik!

Everyone in Cincinnati knows this kicker is a Sex Addict. It is no secret... he can't even keep relationships because his Red Rocket has freckles that need to be touched constantly.- nik

**So crazy that "*my guy*" told me to take the Jets heavy and the over because Shayne Graham will be shaving points today. He said he has been paid off to throw the game. Printing money today... thanks Red Rocket.

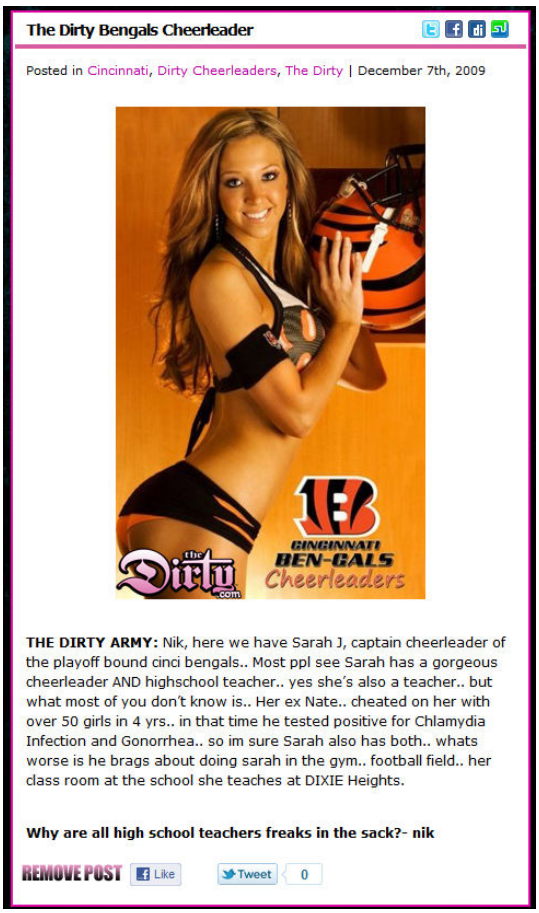
REMOVE POST Like Tweet 0

THE DIRTY ARMY: Nik, this is Sara J, Cincinnati Bengal Cheerleader. She's been spotted around town lately with the infamous Shayne Graham. She has also slept with every other Bengal Football player. This girl is a teacher too!! You would think with Graham's paycheck he could attract something a little easier on the eyes Nik!

Everyone in Cincinnati knows this kicker is a Sex Addict. It is no secret... he can't even keep relationships because his Red Rocket has freckles that need to be touched constantly.- nik

At the time this first post was submitted, it is undisputed that Mr. Richie did nothing to "encourage" or "solicit" posts about Ms. Jones. Rather, it is undisputed that a third party unilaterally decided to submit the post. As the court held in *S.C. v. Dirty World*, this is precisely where immunity applies; "In sum, a third party unilaterally created and submitted the Church Girl Post without specific instructions or requests from the Defendants to do so. This is precisely the type of situation that warrants CDA immunity." 2012 WL 3335284, *4 (W.D.Mo. 2012) (citing *Doe v. MySpace, Inc.,* 528 F.3d 413, 419 (5th Cir.2008) ("[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.")).

Additionally, as reflected in the post itself, Mr. Richie's comment about the first post was not directed at Ms. Jones (who was a complete stranger); it was directed at the Bengals player appearing with Ms. Jones. Mr. Richie's comment did not "encourage" third parties to submit further posts about Ms. Jones; his comment did not even *mention* Ms. Jones. Without even the slightest degree of encouragement, more than a month later on December 9, 2009, another post was submitted about Ms. Jones.



Interestingly, unlike the first post in which Mr. Richie did not make any reference to Ms. Jones, following the second post Mr. Richie made a generic but somewhat more specific comment rhetorically asking "Why are all high school teachers freaks in the sack?" Despite making an arguably specific comment about Ms. Jones, it is undisputed that after Mr. Richie's "freak in the sack" remark, no other new actionable comments were submitted to the site about Ms. Jones.

Thus, although the court in *S.C. v. Dirty World* attempted to distinguish the conflicting results by pointing to Mr. Richie's comments about Ms. Jones in this case, the fact remains that Mr. Richie's comments did nothing to encourage anyone to post anything *unlawful* about Ms. Jones. The only allegedly unlawful content appeared on the site before Mr. Richie made any specific comments about Ms. Jones. Based on the timing of these events and putting the law aside, there is simply no factual basis for Ms. Jones to claim that Mr. Richie "encouraged" the posts which she claims were unlawful. These posts were submitted and published before Mr. Richie made any comments about Ms. Jones, and once Mr. Richie's comments were made, no other new defamatory posts were made.

MYTH #5—Voluntarily Removing Content Affects CDA Immunity

The final myth worth discussing is this—because Mr. Richie voluntarily removed the post about the plaintiff in *S.C. v. Dirty World* while refusing to remove the posts about Ms. Jones, the conflicting results are justified based on the different facts. Restated differently, Ms. Jones argues that a website owner should remain protected by the CDA if it removes content upon demand, while immunity should be denied if the website owner refuses to remove content upon notice that it is false.

In fairness to Ms. Jones, this argument is the *least* incorrect one she has made, but only because the Missouri court made a passing reference to that point; "Unlike *Jones*, Richie also removed the Church Girl Post. Again, this suggests that the Defendants neither adopted or encouraged further development of the post. Given these significant factual differences, *Jones* is not persuasive." 2012 WL 3335284, *5.

The problem is that as a matter of law, every court that has actually considered this issue has ruled that immunity is *never* affected by the website's refusal to remove content upon demand; "immunity is not vitiated because a defendant fails to take action despite notice of the problematic content." *Black v. Google*, 2010 WL 3222147, *3 (N.D.Cal. 2010) (citing *Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) ("It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech."); *Zeran*, 129 F.3d at 333 ("Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA.")); *see also Global Royalties*, 544 F.Supp.2d at 932 (finding owner of www.ripoffreport.com remained protected by the CDA even after refusing to remove allegedly defamatory posts); *Giordano v. Romeo*, 76 So.3d 1100 (Fla. 3d Dist. 2011) (same); *Shrader v. Biddinger*, 2012 WL 97632, *8 (D.Colo. 2012) (finding CDA applied even though "defendants did not remove the posting when they were alerted ... to plaintiff's assertion that the posting was defamatory. The court agrees with the ... defendants that such conduct as asserted is precisely the type of conduct that is protected by the CDA.") (empahsis added); *Mmubango v. Google, Inc.*, 2013 WL 664231, *3 (E.D.Pa. 2013) (holding Google entitled to CDA immunity even though it refused to remove defamatory content; "Google cannot be held liable for state law defamation on the facts that it 'decided' to publish a third party's statements, which has been identified by the Third Circuit as a traditional editorial function. In the same vein, Google cannot be held liable for failing to withdraw this statement once it has been published.")

Because Mr. Richie voluntarily removed the post at issue in *S.C. v. Dirty World* before the lawsuit was filed (for which he was thanked by being sued), the Missouri court had no opportunity to consider whether Mr. Richie would have remained immune if the post was not removed; that question was simply never litigated nor decided. As such, the Missouri court's passing reference to this issue does not provide a basis to hold that Mr. Richie's refusal to remove the posts about Ms. Jones justifies denying immunity to him for that editorial choice.

ADDITIONAL COMMENTS

In closing, two brief additional comments are necessary. First with respect to Ms. Jones's argument that an interlocutory appeal is inappropriate because "all the time and money in preparation for trial has largely been spent," this comment overlooks the fact that unlike Plaintiff, Defendants are actually paying hourly fees for the defense of this case. Because it appears that Ms. Jones intends to drastically expand the second trial by raising the argument about Mr. Richie's alleged "attempted extortion", it is virtually certain that the second trial will be at least double the length of the first.

As a result, preparing for and attending the second trial would be extremely expensive for Defendants—money and time that is unrecoverable even if Defendants prevail. As the Ninth Circuit explained in *Roommates*, one of the primary purposes of the CDA is to insulate website owners from such expenses; "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Roommates.com*, 521 F.3d at 1175. Although Defendants respectfully believe the Sixth Circuit erred when it found the first appeal was premature, the fact remains that other courts have held the denial of CDA immunity is so important that interlocutory review should be granted. *See Hill v. StubHub, Inc*, 727 S.E.2d 550 (N.C.App. 2012). The same logic applies here.

Defendants' second and final comment is this—as this Court considers whether its first ruling on the CDA was correct, it should note that the CDA is a form of statutory immunity specifically granted by Congress to website owners and operators like Mr. Richie and Dirty World. As other courts have noted: "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process. As we have often explained in the qualified immunity context, 'immunity is an immunity from suit rather than a mere defense to liability' and 'it is effectively lost if a case is erroneously permitted to go to trial.'" *Nemet Chevrolet, Ltd v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

Why is this point important to consider? Rightly or wrongly, Congress decided to immunize website operators for the same reason that the common law provides immunity to judges. The role of a judge is inherently difficult. Judges must make complicated decisions that can have dramatic (often life-or-death) consequences for the parties appearing before the court. Naturally, every case involves a winner and a loser, and nearly every case involves a party who disagrees with one or more of the judge's decisions.

Despite this, judges are afforded broad immunity for virtually any and all choices they make, regardless of whether their ruling is right or wrong and regardless of how much harm a litigant may suffer as a result. *See Stump v. Sparkman*, 435 U.S. 349, 355–56, 98 S.Ct. 1099 (1978) (holding that judge who issued *ex parte* order imposing involuntary forced sterilization of mentally impaired minor child was entitled to absolute immunity; "judges … are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.")

Although erroneous decisions may cause severe harm to those affected, this cannot justify imposing personal liability on the judge who made the error. The reasons for this could not be clearer—if a judge was subject to personal liability for making an incorrect decision, this would open the floodgates for every losing party to bring a new action claiming the judge acted improperly and unlawfully. Regardless of merit, such claims would not only discourage the best and brightest from joining the judiciary, it would impose crippling expense on the taxpayers who fund the courts, and it would ultimately bring the entire justice system to a halt.

Without in any way implying that Mr. Richie's actions or practices are as laudable as those of most judges, the fact remains that like all website operators, Mr. Richie performs many judge-like functions when reviewing third party submissions. Just as judges must review cases and decide complex matters of fact and law, Mr. Richie is charged with making difficult judgment calls on what material to publish, which to reject, which to remove, and which to keep. Each day, Mr. Richie must review thousands of posts/comments each day, and he must quickly decide what to block and what to allow.

Because this process results in the removal or blocking of least *some* offensive content, Congress chose to confer absolute immunity on website operators like Mr. Richie as to incentive to encourage further screening and content review without fear of liability. *See Zeran*, 129 F.3d at 333 (noting, "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement--from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.")

In short, no matter how much this Court may disapprove of www.TheDirty.com or of Mr. Richie's editorial practices, the fact remains that website operators like Mr. Richie are providing a valuable public service both by offering open forums for speech, and also for making at least *some* effort to "self-police" their sites for inappropriate or unlawful content. Congress expressly created CDA immunity to encourage exactly the sort of active content review that Mr. Richie performs, not to punish it.

As such, it is simply wrong to suggest that sites like Facebook are somehow *more* responsible than Mr. Richie (and thus more deserving of CDA immunity) because Facebook does nothing whatsoever to review content before it appears online. This is like saying that parents who leave their teenage children at home unsupervised for extended periods are *more responsible* than those who insist on a chaperone or a babysitter simply because the absentee parents can claim ignorance of whatever happens during their absence. Parents who leave their children unsupervised are, of course, less likely be aware that their kids are smoking, drinking, or having unprotected sex, but this does not make those parents more responsible than others who provide active supervision to prevent such harmful conduct in the first place.

By denying CDA immunity in this case, the Court has voted to reward complacency by sites like Facebook (which has resulted in numerous suicides resulting from online bullying) while simultaneously punishing Defendants for doing exactly what Congress encouraged—reviewing, screening, and blocking at least some offensive content. For these reasons, the Court should revisit and reverse its prior decision denying summary judgment. Alternatively, if the Court declines to do so, it should issue an order staying this case and finding the matter appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

RESPECTFULLY SUBMITTED: April 11, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ David S. Gingras
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